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Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-286–07 OF 2020 AND WA-22M-102–05 OF 2021
AZLAN SULAIMAN JC
4 MARCH 2021

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Companies and Corporations — Liquidators — Duties/powers of liquidator — Whether liquidator had no power under Companies Act 2016 to delegate exercise of his powers to someone else — Whether 'sanction' liquidator had issued to contributory to prosecute or defend actions on behalf of wound up company was invalid and inoperable — Whether creditor or contributory could only act on company's behalf if sanctioned by court and only if liquidator had, in the first place, refused to or was unable to act — Companies Act 2016 s 486(2)

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At the case management for the joint hearing of the two suits herein, the court directed the parties to submit on a preliminary issue of whether a liquidator of a wound up company could sanction or delegate his power under item (a) of the 12th Schedule of the Companies Act 2016 to any other person to bring or defend an action or other legal proceeding in the name and on behalf of the

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wound up company. The issue arose when the plaintiff indicated at the case management that it would be withdrawing its claim in Suit 286 against the first defendant ('the company') and be applying for security for costs against the company in Suit 102. The company was wound up by order of court after the two suits were filed and the official receiver was appointed as its liquidator ('the

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liquidator'). The company's counsel informed the court that he would seek costs for the withdrawal of Suit 286 while in the case of Suit 102, he had been instructed by a contributory of the company to oppose the application for security for costs and continue with the prosecution of the suit against the plaintiff. Counsel also informed the court that the contributory had obtained

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the liquidator's written 'sanction' to defend the company in Suit 286 and prosecute the action in Suit 102. The 'sanction' letter lay down certain conditions: (a) that a guarantor had to give the liquidator an undertaking and a bond depositing a specified sum of money with the Insolvency Department; (b) that neither the liquidator nor the company would be held responsible for

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any failure, loss or costs involved in or imposed as a result of the litigation in the two suits; (c) that the guarantor would bear all the costs in the two suits; and (d) that the lawyers representing the company in the two suits would keep the liquidator updated on the progress of the suits. The plaintiff argued that the liquidator had no power under the law to delegate his powers/duties or to issue

a 'sanction' to anyone to either continue with Suit 102 or defend the company in Suit 286. A

Held, determining the preliminary issue in the plaintiff's favour:

(1) The liquidator (official receiver) in this case did not have the power to issue a sanction to the contributory to continue with Suit 102 or to defend Suit 286 on behalf of the company. The supposed 'sanction' that the liquidator issued to the contributory was invalid and inoperable (see para 24). B

(2) Section 486(1) and the 12th Schedule of the Companies Act 2016 ('CA') were the source of a liquidator's powers in a winding up by the court. The liquidator could only exercise those powers that the statute had expressly given him. item (a) of the 12th Schedule allowed the liquidator to 'bring or defend any action or other legal proceedings in the name and on behalf of the company'. item (j) allowed the liquidator to 'appoint an agent to do any business which the liquidator is unable to do' whilst under item (k) the liquidator could 'appoint an advocate to assist him in his duties'. Nothing in the CA or in s 486 or the 12th Schedule gave the liquidator the power to delegate the exercise of any of his powers to someone else or to issue a sanction to someone else to exercise those powers. This necessarily meant that Parliament intended for only the liquidator to have those general powers including the power to bring or defend any action or other legal proceedings in the name and on behalf of the company (see paras 10–11, 16 & 47). C D E

(3) The liquidator's 'sanction' letter in the instant case, in effect and substance, delegated his powers under item (a) of the 12th Schedule to the contributory to prosecute Suit 102 and to defend Suit 286. As for the condition in the letter for a guarantor to provide security, there was no provision in the CA that enabled the liquidator to take any security except r 47 of the Companies (winding up) Rules 1972 which allowed the official receiver to direct a private liquidator to provide security, which was not the case here. As for the appointment of solicitors, item (k) of the 12th Schedule of the CA did not extend to appointing an advocate to assist a contributory to carry out a liquidator's duties (see paras 21–23). F G H

(4) Under s 486(2) of the CA, a creditor or contributory could apply to court with regard to any exercise or proposed exercise of any of the powers exercisable by the liquidator in a winding up including the power to bring an action on behalf of a wound up company. It was only when the liquidator refused to act, or was unable to, or was advised not to, or did not have the funds to act could a creditor or contributory apply to the winding up court to either compel the liquidator to act or seek leave of court to themselves bring or defend an action in the name of the company (see paras 26 & 35). I

[Bahasa Malaysia summary

Pada pengurusan kes untuk pendengaran bersama kedua-dua saman di sini, mahkamah telah mengarahkan pihak-pihak untuk mengemukakan isu awalan sama ada pelikuidasi syarikat yang digulung boleh memberikan sanksi atau mewakilkan kuasanya di bawah Butiran (a) Jadual Ke-12 Akta Syarikat 2016 kepada mana-mana orang lain untuk membawa atau mempertahankan tindakan atau prosiding undang-undang lain atas nama dan bagi pihak syarikat yang digulung. Isu tersebut timbul apabila plaintif memberikan indikasi semasa pengurusan kes bahawa ia akan menarik balik tuntutannya dalam Saman 286 terhadap defendan pertama ('syarikat tersebut') dan akan memohon jaminan untuk kos terhadap syarikat tersebut dalam Saman 102. Syarikat telah digulung dengan perintah mahkamah selepas kedua-dua saman tersebut difailkan dan Pegawai Penerima dilantik sebagai pelikuidasinya ('pelikuidasi'). Peguam syarikat tersebut memaklumkan mahkamah bahawa beliau akan menuntut kos bagi penarikan balik Saman 286 manakala dalam kes Saman 102, beliau telah diarahkan oleh penyumbang syarikat untuk menentang permohonan jaminan untuk kos dan meneruskan pengemukaan saman terhadap plaintif. Peguam juga memaklumkan kepada mahkamah bahawa penyumbang telah memperoleh 'sanksi' bertulis pelikuidasi untuk membela syarikat dalam Saman 286 dan mengemukakan tindakan dalam Saman 102. Surat 'sanksi' tersebut meletakkan syarat-syarat tertentu: (a) bahawa penjamin harus memberikan pelikuidasi suatu akujanji dan bon mendepositkan sejumlah wang tertentu dengan Jabatan Insolvensi; (b) bahawa pelikuidasi mahupun syarikat tidak akan bertanggungjawab ke atas sebarang kegagalan, kerugian atau kos yang terlibat dalam atau dikenakan akibat daripada litigasi dalam dua tindakan tersebut; (c) bahawa penjamin akan menanggung semua kos dalam kedua-dua tindakan tersebut, dan (d) bahawa peguam yang mewakili syarikat dalam dua tindakan tersebut akan memastikan pelikuidasi dikemas kini tentang perkembangan tindakan tersebut. Plaintif berpendapat bahawa pelikuidasi tidak mempunyai kuasa di bawah undang-undang untuk mewakilkan kuasa/tugasnya atau mengeluarkan 'sanksi' kepada sesiapa untuk sama ada meneruskan Saman 102 atau mempertahankan syarikat dalam Saman 286.

Diputuskan, menentukan isu awal yang memihak kepada plaintif:

(1) Pelikuidasi (Pegawai Penerima) dalam kes ini tidak mempunyai kuasa untuk mengeluarkan sanksi kepada penyumbang untuk meneruskan Saman 102 atau untuk mempertahankan Saman 286 bagi pihak syarikat. 'Sanksi' yang sepatutnya dikeluarkan oleh pelikuidasi kepada penyumbang adalah tidak sah dan tidak boleh digunapakai (lihat perenggan 24).

(2) Seksyen 486(1) dan Jadual ke-12 Akta Syarikat 2016 ('CA') adalah punca kuasa pelikuidasi dalam penggulungan oleh mahkamah. Pelikuidasi

hanya boleh menggunakan kuasa yang statut telah diberikan secara nyata kepadanya. Butiran (a) Jadual ke-12 membenarkan pelikuidasi untuk 'membawa atau mempertahankan sebarang tindakan atau prosiding undang-undang lain atas nama dan bagi pihak syarikat'. Perkara (j) membenarkan pelikuidasi untuk 'melantik ejen untuk melakukan apa-apa tugas yang pelikuidasi tidak dapat lakukan' manakala di bawah Perkara (k) pelikuidasi boleh 'melantik peguam untuk membantunya dalam tugasnya'. Tiada apa-apa dalam CA atau dalam s 486 atau Jadual ke-12 memberikan pelikuidasi kuasa untuk mewakilkan pelaksanaan mana-mana kuasanya kepada orang lain atau mengeluarkan sanksi kepada orang lain untuk melaksanakan kuasa tersebut. Ini semestinya bermakna bahawa Parlimen berhasrat untuk hanya pelikuidasi mempunyai kuasa am tersebut termasuk kuasa untuk membawa atau mempertahankan sebarang tindakan atau prosiding undang-undang lain atas nama dan bagi pihak syarikat (lihat perenggan 10–11, 16 & 47).

(3) Surat 'sanksi' pelikuidasi dalam kes semasa, dalam kesan dan substansi, mewakilkan kuasanya di bawah Butiran (a) Jadual Ke-12 kepada penyumbang untuk mengemukakan Saman 102 dan untuk mempertahankan Saman 286. Bagi syarat dalam surat untuk penyumbang untuk memberikan jaminan, tidak ada peruntukan dalam CA yang membolehkan pelikuidasi mengambil sebarang jaminan kecuali k 47 Kaedah-Kaedah (Penggulungan) Syarikat 1972 yang membenarkan Pegawai Penerima mengarahkan pelikuidasi persendirian untuk menyediakan jaminan, yang tidak terpakai di sini. Bagi pelantikan peguamcara, Butiran (k) Jadual ke-12 CA tidak meliputi pelantikan peguam untuk membantu penyumbang untuk menjalankan tugas pelikuidasi (lihat perenggan 21–23).

(4) Di bawah s 486(2) CA, pemiutang atau penyumbang boleh memohon kepada mahkamah berkenaan dengan apa-apa pelaksanaan atau cadangan pelaksanaan mana-mana kuasa yang boleh dijalankan oleh pelikuidasi dalam penggulungan termasuk kuasa untuk membawa tindakan. bagi pihak syarikat yang digulung. Hanya apabila pelikuidasi enggan bertindak, atau tidak dapat, atau dinasihatkan untuk tidak, atau tidak mempunyai dana untuk bertindak, pemiutang atau penyumbang boleh memohon kepada mahkamah penggulungan untuk sama ada memaksa pelikuidasi bertindak atau memohon kebenaran mahkamah untuk membawa atau mempertahankan tindakan atas nama syarikat (lihat perenggan 26 & 35).]

Cases referred to

Ah Toy v Registrar of Companies (NT) (1986) 72 ALR 107, FC (refd)
Cape Breton Company v Fenn (1881) 17 Ch D 198, CA (refd)
Goh Siew Koon @ Eng Sing Kuan & Ors v Lim Jit Kim @ Lim Tian Jee & Ors [2015] MLJU 2229; [2015] 1 LNS 1222, CA (refd)

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406; [2012] 10 CLJ 88, CA (refd)

Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors [1999] 6 MLJ 725, HC (refd)

Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614, FC (distd)

Merais Sdn Bhd v Lai King Lung (practising as an advocate and solicitor under the name and style of Messrs Chris Lai, Yap and Partners Advocates and Solicitors) & Anor [2019] 5 MLJ 801; [2019] 7 CLJ 1, CA (distd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (refd)

Russell v Westpac Banking 13 ACSR 5 (refd)

Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors [2017] 6 MLJ 116; [2017] 9 CLJ 45, CA (refd)

University of Malaya v FBSM Ctech Sdn Bhd [2018] 5 MLJ 397; [2018] 8 CLJ 71, CA (refd)

Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 CLJ 1, FC (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (distd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 232(i), 236(1)(e), (2)(a), (3)

Companies Act 2016 ss 486, 486(1), (1)(a), (2), 12th Schedule, Part I, items (a), (b), (c), (d), (e), (f), (g), (h), (i), (k), (l)

Companies (winding up) Rules 1972 r 47

Rules of Court 2012 O 21 r 3, O 23

Syed Fadzil Alhabshi (with Fawza Sabila Faudzi) (Sidek Teoh Wong & Dennis) in Suit No WA-22M-286–07 of 2020 for the plaintiff.

Wan Sharifah bt Wan Yusoff (Wan Sharifah Jamilah & Partners) in Suit No WA-22M-286–07 of 2020 for the defendant.

Mohd Yaacob bin Bakanali (Lainah Yaacob & Zulkepli) in Suit No WA-22M-102–05 of 2021 for the plaintiff.

Syed Fadzil Alhabshi (with Fawza Sabila Faudzi) (Sidek Teoh Wong & Dennis) in Suit No WA-22M-102–05 of 2021 for the defendant.

Azlan Sulaiman JC:

OVERVIEW

[1] This judgment will examine whether a liquidator of a wound up company can issue a sanction or delegate to another person his power under item (a) of the 12th Schedule of the Companies Act 2016 ('the Act') to bring or defend any action or other legal proceedings in the name and on behalf of that company.

BACKGROUND

[2] Two suits before this court, Suits WA-22M-286–07 of 2020 ('Suit 286') filed in July 2020, and WA-22M-102–05 of 2021 ('Suit 102') filed in May 2021 are to be heard together. Small Medium Enterprise Development Bank Malaysia Bhd ('the bank') is the plaintiff in Suit 286 and the defendant in Suit 102. Oren Venture Sdn Bhd ('the company') is the 181 defendant in Suit 286, and the plaintiff in Suit 102. The other three defendants in Suit 286 were directors of the company. They are not parties to Suit 102. Further, while the bank is represented by the same firm of solicitors in both suits, the company is represented by two separate firms of solicitors in Suit 286 and Suit 102.

[3] On 23 March 2021, in Kuala Lumpur High Court winding up No WA-28NCC-111–01 of 2020, the company was given two months until 25 May 2021 to pay all its outstanding debts to the petitioner, TNO Project Management Sdn Bhd, failing which it would be wound up on 25 May 2021 under the provisions of the Act, and the *Pegawai Penerima* be appointed its Provisional liquidator ('the liquidator'). The company did not pay that debt, and was wound up on 25 May 2021. This means that the company was wound up after Suits 286 and 102 were filed but before they were disposed of.

[4] Because of that, the bank decided to do two things. Firstly, to withdraw Suit 286 against the company, and secondly, to apply for security for costs against it in Suit 102. The bank has not filed any application under O 21 r 3 of the Rules of Court 2012 to discontinue Suit 286, hoping to do so without applying, but has filed an application against the company under O 23 for security for costs ('security for costs application').

[5] On 9 February 2022, these two suits came up before me, for case management on the withdrawal of Suit 286 against the company and on the security for costs application. Counsel for the company in Suit 286 informed the court that her instructions were to seek costs from the bank for the withdrawal of Suit 286 against Oren Venture.

[6] As for the security for costs application in Suit 102, counsel for the bank informed me that his instructions are to proceed with it. Counsel for the company in Suit 102 informed me that he is being instructed by a contributory of the company who had obtained a 'sanction' in a letter dated 13 December 2021 from the liquidator to proceed with Suit 102 against the bank, which would include opposing the security for costs application. Indeed, the affidavit filed by the company opposing the security for costs application was affirmed by one Nor Lizah bt Basir on 25 January 2022 as a *Pengarah* of Oren Venture.

[7] For the purpose of ensuring that any withdrawal of Suit 286 against the company and the disposal of the security for costs application is done in accordance with the law, I invited counsel to address me on one preliminary issue, namely:

> *Whether a liquidator of a wound up company can issue a sanction or delegate his power under item (a) of the 12th Schedule of the Companies Act, 2016 to any other person to bring or defend any action or other legal proceedings in the name and on behalf of that company.*

[8] All three counsels then submitted their respective counsel's note outlining their positions. Counsel for the company in both suits also adduced the letter each had received from the Jabatan lnsolvensi Malaysia ('JIM'), which they regarded as the sanction issued by the liquidator to the contributory they were taking instructions from ('the contributory') to continue with Suit 102 and defend Suit 286. Save for being addressed to their separate firms, these two letters dated 25 October 2021 and 13 December 2021 (collectively, 'the JIM letters') were identical in their terms in that:

(a) both were signed by the same officer from JIM;

(b) both shared the same title, 'Syarat-syarat bagi permohonan kebenaran penyelesai di bawah Akta Syarikat 1965/Akta Syarikat 2016';

(c) both referred to a *Surat Aku Janji* that had been submitted to JIM;

(d) based on that *Surat Aku Janji*, both stated that 'Pegawai Penerima dan Penyelesai ('PPP') bagi syarikat Oren Venture Sdn Bhd (No Syarikat 952205-P)(dalam penggulungan) telah meluluskan kebenaran penyelesai ('sanksi') untuk tuan/puan memulakan dan/atau meneruskan tindakan di Mahkamah Tinggi Kuala Lumpur bagi Guaman' Suit 286 or Suit 102, as the case was, 'dan melantik' their respective firm 'untuk mewakili syarikat Oren Venture Sdn Bhd (No Syarikat 952205-P) (dalam penggulungan) dalam guaman tersebut tertakluk kepada syarat-syarat yang berikut'; dan

(e) those *syarat-syarat* (conditions) included a competent 'Penjamin' providing the PPP with an 'Aku Janji Penjamin' and a 'Bon Jaminan', and further depositing a specified sum of money with the PPP; that

neither the PPP nor the estate of the company would be responsible or held responsible for any failure, loss or costs involved in or imposed by that action, and that the 'Penjamin' would bear all costs; and that the lawyers having the conduct of the matter would inform PPP in writing of the progress of the case from time to time.

THE PARTIES' POSITION

[9] Both counsels for the company took the position that the JIM Letters clothed the contributory with the power to continue with Suit 102 and defend Suit 286. They both rely on *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785. Counsel for the bank submitted that the liquidator cannot delegate his power or issue a sanction to anyone to continue with Suit 102 and defend Suit 286, and must attend court to confirm the appointment of the solicitors for the company in both Suit 102 and Suit 286.

THE ANALYSIS

Section 486(1) and the 12th Schedule of the Act

[10] The starting point is that a liquidator is a creature of statute, and he derives his powers from the statute that creates him and enables him. In other words, he only has and can only exercise those powers that the statute expressly gives him. In Malaysia, s 486(1) and the 12th Schedule of the Act are the source of a liquidator's powers in a winding up by the court, which this is.

[11] By s 486(1)(a), the liquidator may, without the authority of the court or of the committee of inspection exercise any of the general powers in Part I of the 12th Schedule. Part I consists of items (a) to (I). Under item (a) of the 12th Schedule, a liquidator may 'bring or defend any action or other legal proceedings in the name and on behalf of the company'. Under item (j) he may 'appoint an agent to do any business which the liquidator is unable to do', and under item (k) he may 'appoint an advocate to assist him in his duties'. The language used in respect of those general powers in Part I connote that the liquidator must exercise those powers personally.

[12] Section 486(2) of the Act provides that 'The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers'.

The equivalent provisions under the Companies Act 1965

[13] It would be appropriate at this juncture to look at the similar provisions under the previous Companies Act, 1965, as most of the case authorities that Counsel referred to were decided under it. They are ss 236(2)(a), 232(i), and 236(3):

> Section 236(2)(a)
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> The liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company.
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> Section 236(2)(i)
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> The liquidator may appoint an agent to do any business which the liquidator is unable to do himself.
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> Section 236(3)
>
> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[14] As for appointing an advocate to assist him in his duties, s 236(1)(e) provided that the liquidator could only do that 'with the authority either of the Court or of the committee of inspection'. However, in *Zaitun Marketing,* the Federal Court held that the liquidator can still appoint an advocate to assist him to bring or defend an action without the authority of the court or the committee of inspection, because he clearly needs the services of an advocate to do so.

[15] Back to the analysis. In *Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116; [2017] 9 CLJ 45, Zabariah Mohd Yusof JCA (as Her Ladyship then was) reaffirmed the basic established principle that 'The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings is vested in the liquidator ... It is left to the liquidator as to how to proceed with any legal proceedings'.

The Act does not expressly provide for a liquidator's sanction

[16] The Act — including s 486 and the 12th Schedule — does not contain any express provision giving a liquidator the power to delegate or abrogate the exercise of any of his powers, or the power to issue a sanction to someone else to exercise any of those powers. This necessarily means that Parliament had intended for only the liquidator to have those general powers, including that power to 'bring or defend any action or other legal proceedings in the name and on behalf of the company'.

[17] In *Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors*

[1999] 6 MLJ 725, two individuals were appointed as receivers and managers of the plaintiff company, and they brought claims for and on behalf of the company against the defendants for an unpaid loan. The company was then wound up, and the appointed liquidator gave them both the power to continue prosecuting those claims. KC Vohrah J said (at p 728 E-G):

> As for the second question, I am puzzled as to how the liquidator could have appointed Ler Cheng Chye and Lam Tuck Cheong as receivers and managers. Where did he derive such a power? Ler and Lum ceased to be receivers and managers of the company upon the order of winding up made in respect of the company, and to cite the name of the plaintiff and state '(Dalam Pembekuan) (Penerima dan Pengurus dilantik)' is clearly not correct or relied. The power of instituting any suit is at the discretion of the liquidator (see s 236(a)) — the power is his and he cannot delegate it. Although a general provision, s 236(2)(i) allows a liquidator to appoint an agent to do any business, it is for business which the liquidator is unable to do himself, but that cannot override the specific provision of s 236(2)(a) giving him power 'to bring or defend any action or other legal proceeding in the name of or on behalf of the company)'.

[18] Over ten years earlier in Australia, in *Ah Toy v Registrar of Companies (NT)* (1986) 72 ALR 107, the appellant was appointed the provisional liquidator and then liquidator of Day & Dent Constructions Pty Ltd. However, because of his advanced age, he appointed Price Waterhouse as 'my agents for the purposes of such liquidation and for all matters incidental thereto', and played little part in the liquidation process. Justices Toohey, Marling and Wilcox JJ said (at p 112 of the judgment):

> The Companies Act contains no provision for the delegation of the functions of the provisional liquidator. In relation to liquidators there is a limited provision. Section 236(2)(j) provides that a liquidator 'may appoint an agent to do business which the liquidator is unable to do himself'. That provision falls well short of authorizing the type of wholesale delegation undertaken in this case. The purpose of s 236(2)(j) was to enable delegation of specific tasks which the liquidator, for one reason or another,is not able to undertake. The scheme of the Act is that the liquidator remains generally responsible to the court and to the creditors and contributories of the company for the conduct of the liquidation. We agree with the comments by Marks J made in relation to a similar general delegation in Harvey at 754, that if a liquidatoris so disabled in some way that he cannot perform the duties to which he has been appointed, his duty is not to appoint an agent but to seek leave to resign his office.

[19] *Ah Toy v Registrar of Companies* was applied in *Goh Siew Koon @ Eng Sing Kuan & Ors v Lim Jit Kim @ Lim Tian Jee & Ors* [2015] MLJU 2229; [2015] 1 LNS 1222. In that case, one Lim Aik @ Lim Yeck was appointed as liquidator of Sin Hai Estate Bhd ('Sin Hai'). He then appointed Pricewaterhouse Coopers Advisory Services Sdn Bhd ('Pricewaterhouse') to assist him in 'all aspect of the liquidation' of Sin Hai, for 'professional fee', and

paid out over RM1.1m to it. One year into his appointment, he applied to the court, inter alia, to appoint one Lim San Peen of Pricewaterhouse as a joint-liquidator, and to validate all of his previous actions and all payments made to Pricewaterhouse. The majority contributories applied to remove him as liquidator and appoint someone of their choice to replace him. The High Court dismissed their application and the contributories appealed. In paras [43] and [46] of its judgment (which sandwiched the reference to *Ah Toy v Registrar of Companies* in para [44]), the Court of Appeal said:

> It is obvious that the appointment of Pricewaterhouse was not 'to appoint an agent to do any business which the liquidator is unable to do himself' within the meaning of s 236(2)(i) of the Companies Act 1965. It was not merely to assist Mr LA in his ordinary administrative and management duties that are within his ordinary professional competence: *Wong Sin Fan & Ors*. Mr Lim Aik had in effect abrogated the powers granted to him by the court, thus rendering his position superfluous and untenable.
>
> By authorizing Pricewaterhouse to assist in 'all aspect of the liquidation', Mr LA had effectively given Pricewaterhouse carte blanche to perform all the work that the court entrusted him to carry out. This conduct must not be condoned by the court. As stated by the Federal Court of Australia in *Ah Toy*, provisional liquidators and liquidators are appointed to their office as individuals and upon the strength of their personal qualifications.

[20] In *University of Malaya v FBSM Ctech Sdn Bhd* [2018] 5 MLJ 397; [2018] 8 CLJ 71, the appellant appointed Technitium Sdn Bhd as its contractor to supply an information system to the University of Malaya Medical Centre, and Technitium appointed the respondent as its subcontractor. The respondent brought an action against the appellant for payments due from the appellant to Technitium, and the appellant applied to strike out the claim. Apart from privity of contract, one of the grounds for striking out was that the respondent had been wound up and the liquidator had given a sanction to one of its creditors to bring the action. Rohana Yusof JCA (as Her Ladyship then was) said:

> There is no law that says a liquidator's powers as contained in s 236 of the Companies Act 1965 can allow a liquidator to 'sanction' a creditor to take out an action for an on behalf of a wound up company (see s 236(3) of the Companies Act 1965). In this regard, we found the learned trial judge had failed to appreciate what sanction is, and the ambit of the liquidator's powers under the Companies Act.

And further down in Her Ladyship's judgment:

> The law relating to companies' liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation.

[21] Looking again now to the JIM letters, I would hold that JIM/the PPP had by the 'sanksi', in effect and substance, abrogated and delegated his liquidator's power under item (a) of the 12th Schedule to the contributory, to continue to bring Suit 102 and to defend Suit 286. It was not an appointment of agent to do any business which he as liquidator was unable to do. That is evident from the 'Aku Janjin Penjamin, Bon Jaminan', and the monetary deposit that the PPP took as security, to insulate itself from any fall-out that may result from continuing with Suit 102 and defending Suit 286. To borrow words from *Ah Toy*, it was a wholesale delegation of that power.

[22] On the PPP taking security from the *Penjamin*, I would note that the Act does not provide for the liquidator taking any security. The only provision for taking security is in r 47 of the Companies (winding up) Rules 1972, which allows the official receiver to direct a private liquidator to provide security, which is not the case here.

[23] As for appointing solicitors, even though item (k) of the 12th Schedule of the Act allows a liquidator to 'appoint an advocate to assist him in his duties', it would not extend to appointing an advocate to assist a contributory to carry out a liquidator's duties.

[24] Thus, as that power to continue to bring Suit 102 and defend Suit 286 were bestowed on the PPP by s 486 and item (a) of the 12th Schedule of the Act, and as there are no provisions in the Act for him to delegate that power, then based on the cases I have referred to, I would hold that the PPP did not have the power to issue a sanction to the contributory to continue with Suit 102 or defend Suit 286. That supposed 'sanksi' that JIM/PPP issued to the Contributory is invalid and inoperable.

The court's power of sanction under the Act

[25] Nevertheless, I am also of the view that the Act does provide for giving a sanction to a creditor or contributory — and only a creditor and contributory — to bring an action on behalf of a wound up company. However, that power to issue such sanction is only exercisable by the court. The basis for this is s 486(2) of the Act and *Zaitun Marketing*.

[26] As I pointed out earlier, s 486(2) of the Act provides that 'The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers'. It is within the ambit of control over the exercise by the liquidator of his powers that the court may do so.

[27] In paras [17] and [18] of *Zaitun Marketing*, Gopal Sri Ram FCJ said:

> What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction *in the court to authorise other persons to conduct litigation in the name of the company.*
>
> In *Russel v Westpac banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:
>
> > When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd* [1988] 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company.

[28] As to why that court-sanction can only be given to creditors and contributories, in the latter part of para [19] of *Zaitun Marketing*, Gopal Sri Ram FCJ referred to *Cape Breton Company v Fenn* (1881) 17 Ch D 198 in which Cotton LJ said:

> But who are the persons who can be authorised to take these steps? In my opinion the creditors and contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty.

[29] As to circumstances in which the court will authorise those persons to conduct litigation in the name of the company, Gopal Sri Ram FCJ (as he then was) said in the first sentence of para [19]:

> Of course, resort to the court's powers to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority.

[30] *Cape Breton company v Fenn* also mentioned three other instances where the court may authorise them to conduct litigation in the name of the company. These were where the liquidator does not bring an action, where he is advised not to, and where he has no funds to.

[31] The Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88 referred to *Zaitun Marketing*. In para [15] of the judgment, Ramly Ali JCA said:

> Section 236(2) of the Companies Act 1965 strengthens the position that only the official assignee as the appointed liquidator has the power to bring or defend any action or other legal proceedings in the name and on behalf of the wound up company. If for whatever reason, the official assignee as the liquidator is unwilling to initiate the action in the name of the wound up company, a creditor or a

> contributory can apply to the court under ss 236(3) or 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the wound up company or that leave be given to the creditor or contributory himself to bring the action in the name of the company (see *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2005] 1 MLJ 333; [2007] 7 CLJ 516; *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd).* Again, to do so, the creditor or the contributory must have obtained leave of the court before commencing the action in the name and on behalf of the wound up company. (Emphasis added.)

[32] That was also the line taken by the Federal Court about one month later, in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713, though in somewhat different circumstances. In that case two individuals were appointed as liquidators of Kian Joo Holdings Sdn Bhd ('KJH'). The major contributories of KJH took exception to the manner in which they sought to dispose of shares in one of KJH's subsidiary companies, and filed an application in their own names for leave to proceed with legal proceedings for misconduct against them. In para [14] of the judgment, Zulkefli CJ (Malaya) said that the contributories had no cause of action:

> In any event we find that there is no cause of action in the majority contributories. The complaint was that the sale of the company's shares was improperly conducted and accordingly, any loss suffered is in fact suffered by the company. The proper plaintiff is the company and although the liquidators control the company, the majority contributories may obtain *an order from the winding up court* allowing conduct of the action (see the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Boustead Trading (1985) Sdn Bhd* [2010] 2 MLJ 749; [2010] 3 CLJ 785 (FC). (Emphasis added.)

[33] In *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1, the Federal Court said the court could even issue that sanction retrospectively, *nunc pro tune:*

> Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tune* may be given under s 236(2)(a) of the Companies Act *subject to the discretion of the courts under* s 236(3) of the Act. Such *discretion and control by the court under* s 236(3) is to be read together with s 226(3) of the Act. This is notwithstanding the fact that proceedings had already commenced. (Emphasis added.)

[34] In *Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116; [2017] 9 CLJ 45, the suit was filed by the directors of the wound up company. Zabariah Mohd Yusof JCA (as Her Ladyship then was) said:

> In our present case (Suit 207), the official receiver should have come in to institute the action on behalf of the first plaintiff. None of the parties obtained *leave from the*

court for the contributories to institute the action in court. In the event the liquidator refused, then they could get a court order. (Emphasis added.)

[35] Thus, under the Act, the scheme for a wound up company bringing, continuing with or defending an action is very straightforward and simple. Firstly, only the liquidator has the power to do so. It is only when he refuses to, or is unable to, or is advised not to, or has no funds to (and I stress that those grounds are not exhaustive), can a creditor or contributory apply to the winding up court for one of two orders: either to compel the liquidator to bring, continue with or defend that action, or alternatively for an order that they be given the sanction by the court to bring, continue with or defend that action. In their application, they would have to satisfy the court that doing so would be in the interests of the company. And, in giving that sanction, the court can impose terms and conditions, including requiring security and indemnity. But the liquidator does not have that power.

[36] In my view, that process is both rational and logical. Firstly, s 486(2) of the Act makes the exercise of the liquidator's powers subject to the control of the court. This means that there is legislative basis for it.

[37] Secondly, only the court is best placed to make that judicial evaluation of whether bringing, continuing with or defending that action would be in the interests of the company, particularly where the liquidator has first declined to. The court would naturally want to and be entitled to request the presence of the liquidator to hear his views and why he decided not to pursue it himself.

[38] Thirdly, if a liquidator from JIM is allowed to give a sanction to someone else to bring an action, why could not the same power be given to and exercised by a private liquidator? Though the Act does give certain powers to the official receiver over a private liquidator and other functions and duties that a private liquidator does not enjoy, it does not make a distinction between the powers of a liquidator from JIM and the private liquidator. Section 486 and the 12th Schedule of the Act apply equally to all liquidators, public or private. Allowing a private liquidator *carte blanche* power to delegate his duties may lead to misuse and abuse.

[39] Fourthly, as the court's power to sanction a creditor or contributory to bring, continue with or defend and action is derived from s 486(2) of the Act by which it controls the exercise of the powers by the liquidator, then a liquidator is in a subservient position to the court and cannot be placed on par with the court in having that power.

[40] It is in that vein that I now refer to the second and third sentences of para [19] of *Zaitun Marketing,* which both counsel for the company relied on

to contend that the liquidator did have that power to issue a sanction. Gopal Sri Ram FCJ (as he then was) said:

> *But where, as here, the liquidator grants authorisation, there is no necessity to move the court.* Once authority has been given *either by the liquidator or the* by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question. (Emphasis added.)

[41] With all humility and respect, based on the above which points to there being no liquidator's 'sanction' under the Act, I am unable to agree with the words in bold in those sentences. They are incompatible with the principle that a liquidator only has and can only exercise those powers that the Act expressly gives him.

[42] Further, as Rohana Yusof JCA (as Her Ladyship then was) in the *UMMC* case, the sole question on which leave to appeal to the Federal Court had been granted in *Zaitun Marketing* was whether the official receiver/liquidator can appoint an advocate and solicitor to bring an action or to defend an action solely by relying on s 236(2)(a) of the Companies Act 1965 independently of s 236(1)(e). Both Zaki Tun Azmi CJ and Gopal Sri Ram FCJ, who delivered the judgments of the Federal Court, held that he can (see paras [10] and the last part of para [21] of the judgment). The question as to whether or not a liquidator could issue a sanction to another person to bring an action for and on behalf of a wound up company was not directly before the Federal Court in *Zaitun Marketing*.

[43] Gopal Sri Ram FCJ's statements in para [19] of the judgment actually flowed on from para [14] of the judgment in which he said, inter alia:

> The real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ('the DGI' for short) to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action.

However, both *Russel v Westpac Banking* and *Cape Breton Company v Fenn* which he then referred to actually spoke of the court's power to authorise other persons to bring an action, and did not even suggest that the liquidator had that power.

[44] As for the other cases which have referred or alluded to a liquidator's sanction, I would again, with all humility and respect, distinguish them, on the basis that in none of them was it ever raised whether a liquidator had that power of sanction in the first place. None of the parties in any of those cases canvassed that issue. They acted on the assumption that a liquidator did have that power of sanction.

[45] For example, the *Merais* case (*Merais Sdn Bhd v Lai King Lung (practising as an advocate and solicitor under the name and style of Messrs Chris Lai, Yap and Partners Advocates and Solicitors) & Anor* [2019] 5 MLJ 801; [2019] 7 CLJ 1 (CA) and *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614 (FC)). In that case, the company was wound up in between the filing of the suit and the trial, and the official receiver was appointed liquidator. He then granted a sanction to a contributory to continue with the suit. When the suit was dismissed, an appeal was lodged on the contributory's instructions, who simultaneously applied to the official receiver for his sanction to file and prosecute the appeal. That sanction came 42 days later.

[46] From the facts of the case, the conduct of both parties evidenced their belief that the official receiver did have the power to issue a sanction to the contributory to continue the suit at first instance and to lodge an appeal. They had continued with the suit to its conclusion after getting the liquidator's sanction, and immediately after receiving the notice of appeal, the respondent's solicitors wrote to the appellant's solicitors seeking the assurance that 'you would have obtained the required sanction from the official receiver to advance the intended appeal'. The respondent then applied to strike out the appeal on the ground that the appellant did not have that sanction when the appeal was lodged. Thus, the main issue before both the Court of Appeal and the Federal Court in *Merais* was whether the official receiver had the power to grant a sanction that would have retrospective effect. The Court of Appeal held that he had and the Federal Court held otherwise. It was never raised or in issue before either court whether the official receiver actually had the power to issue a sanction, and thus never an issue to be decided by either court.

CONCLUSION

[47] I would accordingly hold that, under the Act, a liquidator of a wound up company does not have the power to issue a sanction or delegate his power under item (a) of the 12th Schedule of the Companies Act 2016 to bring, continue with or defend any action or other legal proceedings in the name and on behalf of that company to any other person, even a creditor or contributory.

[48] I would further hold that the only way a creditor or contributory can bring, continue with or defend any action or other legal proceedings in the name and on behalf of the wound up company is if the liquidator first refuses to do so. They can then apply to court for an order to compel him, or for a court-sanction to do so in his stead. But, without that liquidator's refusal and the court's sanction, they cannot.

[49] I am aware that the timelines for say, bringing an appeal and doing other acts would make going through that process very urgent and onerous. However, the rules do have provisions for extending time, and the courts have on many occasions exercised their discretion in favour of the diligent and industrious.

[50] As the preliminary issue arose at the case management on the intended withdrawal of Suit 286 against the company and on the security for costs application, I will not make any ruling on those two matters for now. Instead, I will fix a further case management for the parties to decide how what they want to do next in both suits. Naturally I make no order as to costs.

Preliminary issue in the plaintiff's favour.

Reported by Ashok Kumar